Nos. 15,252, 15,253, 15,254

United States Court of Appeals

For the Ninth Circuit

MATANUSKA VALLEY LINES, INC., a corporation, and GENERAL CASUALTY COMPANY OF AMERICA, a corporation, LEWIS E. SIMPSON, LOUIS ODSATHER, J. A. COLUMBUS, H. N. BAKER, RUSSELL SWANK and NORMAN G. LANGE, *Appellants,* vs. DOROTHY NEAL and NATHANIEL NEAL, JR., *Appellees.*	No. 15,252
MATANUSKA VALLEY LINES, INC., a corporation, and GENERAL CASUALTY COMPANY OF AMERICA, a corporation, *Appellants,* vs. BLANCHE THOMAS, *Appellee.*	No. 15,253
MATANUSKA VALLEY LINES, INC., a corporation, and GENERAL CASUALTY COMPANY OF AMERICA, a corporation, *Appellants,* vs. WORDIE FRAZIER and PRINCE FRAZIER, *Appellees.*	No. 15,254

On Appeal from the United States District Court, for the District of Alaska, Third Division.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

I.

PLEADINGS AND JURISDICTION.

The civil causes herein dealt with, being A-8214, A-8413 and A-8666 in the District Court for the Dis-

trict of Alaska, Third Division, were previously presented to this Court on appeal by briefs and by oral argument. During oral argument a question arose concerning compliance with Rule 54(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., and accordingly, the appeal was dismissed for the failure of the trial Court to comply with Rule 54(b). That appeal was designated docket numbers 14529, 14530 and 14531 and will hereinafter be referred to as the former or old appeal. This Court has allowed the briefs filed and the printed record filed in the old appeal to be used herein (R 32, 51, 66). Accordingly the appellants adopt the appellants' opening brief in the old appeal and make it a part hereof as if the same appeared in full herein. Subsequent to the issuance of this Court's mandate in the old appeal (R 3, 34, 53) and this Court's opinion filed December 13, 1955, such opinion appearing at 229 Fed. (2d) 136 in which this Court stated: ". . . The verdicts now stand with no judgment . . .", the appellants filed a motion to set aside the verdict and in the alternative for a new trial (R 7, 38) a motion to discharge bond and exonerate bond sureties (R 9, 37) a motion for new trial (R 19) and a motion to set bond on appeal (R 22).

The jurisdiction of the District Court for the District of Alaska rests on the Act of June 6, 1900, 31 Stat. 322 as amended, 48 U.S.C. 101. The jurisdiction of this Honorable Court emanates from 28 U.S.C. 1291 and 28 U.S.C. 1294.

II.

STATEMENT OF CASE.

The subject matter of this supplemental brief had its inception in the verdicts returned by the jury in civil causes A-8214, A-8413 and A-8666 in the District Court for the District of Alaska, Third Division. The verdicts are set forth in the final judgment which was signed the 21st day of May, 1956 (R 14). The jury by its verdicts failed to return a verdict concerning a cross-claim between the defendants Matanuska Valley Lines, Inc., and Louis Williams. Subsequent to the return of the verdicts in each of the causes then pending before the District Court, the appellant moved for a revision of the judgment which was signed the 12th day of October, 1953, and entered on the 14th day of October, 1953 (R docket No. 14531, page 17; R 14530, page 15; R 14529, page 19). The judgment of which revision was sought appears in the record of the old appeal, 14529, page 15; 14530, page 11; 14531, page 13. This motion was subsequently denied by the trial Court and the appeal was taken, resulting in the dismissal by this Court and the issuance of its mandate which provides in part:

> ". . . On consideration whereof, it is now here ordered and adjudged by this court, that the appeal in this cause be, and hereby is, dismissed. (December 13, 1955 . . ."
>
> "You, therefore, are hereby commanded that such proceedings be had in said cause in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding" (R 3, 34, 53).

This Court's opinion referred to in its mandate in the old appeal, filed December 13, 1955, and appearing at 229 Fed. (2d) 136, recites that:

> ". . . The separate appeals will be dismissed . . ."

The opinion of this Honorable Court also recites that:

> ". . . The verdicts now stand with no judgment. A transcript has been made. The case will belong absolutely to the next trial judge who picks it up. If he should desire to enter an appropriate judgment, complying with Rule 54(b) and denying new trial, a single new appeal could be made herein and this court has power to order the use of the previously printed record . . ."

Subsequent to the spreading of the mandate on the records of the District Court for the District of Alaska, Third Division, the appellant filed a motion to set aside the verdicts or in the alternative for a new trial (R 7, 38). Simultaneously, the appellant filed its motion to discharge bond and exonerate bond sureties (R 9, 37). By minute order the Court denied both of appellant's motions (R 11, 55). Appellees filed their motion for judgment on supersedeas bonds (R 10, 40, 10) which was also denied by the Court in its minute order (R 11, 11, 55). Briefs were submitted in support of appellant's motion to discharge bond and exonerate bond sureties and in opposition to appellees' motion for judgment on supersedeas bonds. Extensive argument was had on such motions and the Court ruled, denying both motions as here-

tofore indicated. Appellant's motion to discharge bond and exonerate bond sureties was based upon the contention that (1) there was no judgment to supersede, and (2) that the opinion of the United States Court of Appeals for the Ninth Circuit, filed December 13, 1955, does not require the payment of costs.

The invalidity of the judgment was called to the attention of the trial Court in the course of argument (R 86, 87, 89). The attention of the trial Court was also directed to the fact that by the denial of appellant's motion to discharge bond and exonerate bond sureties, it was in effect continuing the bonds filed in the old appeal over into this present appeal, and accordingly, was contrary to the intent and scope of the bonds' provisions. This question was considered by the Court (R 80, 82) and raised by counsel (R 83, 100, 102, 103). These matters were fully briefed by counsel for both parties and presented to the Court, such briefs not being a part of this record for the sake of brevity.

Appellees' motion to enter final judgment was granted by the Court's minute order dated May 21, 1956 (R 11, 11, 55) and its order and certificate was issued (R 12), and the final judgment from which appeal is now taken was signed on the 21st day of May, 1956 (R 17). Subsequent to the signing of the new judgment, the appellant moved for a new trial (R 19) which was denied on the 1st day of June, 1956 (R 20, 42, 57). Subsequent thereto the appellant moved to set bond on appeal (R 22) and such motion was likewise denied on July 20, 1956 (R 25,

46, 60). Thereafter, the appellant Matanuska Valley Lines, Inc., together with its sureties on the various supersedeas bonds, noticed appeal to the Court of Appeals for the Ninth Circuit (R 21, 43, 58). The sureties are such on the supersedeas bonds filed of record herein and as such, have submitted themselves to the jurisdiction of the District Court when their liability may be established simply on motion pursuant to Rule 73(f) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

III.

SPECIFICATIONS OF ERROR.

1. That the trial Court erred in denying the motion of Matanuska Valley Lines, Inc., for an order discharging bond and exonerating bond sureties.

2. That the trial Court erred in denying the motion of Matanuska Valley Lines, Inc., to set bond on appeal.

3. That the trial Court erred in continuing the cost and supersedeas bonds filed in the former appeal, docket numbers 15252 and 15253 in force and effect in this appeal.

4. That the trial Court erred in denying appellant's motion for new trial.

IV.

ARGUMENT.

A. DENIAL OF APPELLANT'S MOTION FOR AN ORDER DISCHARGING BOND AND EXONERATING BOND SURETIES.

Subsequent to the issuance of this Court's mandate (R 3, 34, 53) and the filing of its opinion appearing at 229 Fed. (2d) 136, the appellant Matanuska Valley Lines, Inc., filed its motion in civil cause numbers A-8214 and A-8413, former docket numbers 14529, 14530, and docket numbers 15252 and 15353 herein, for an order of the trial Court discharging the cost and supersedeas bonds filed in the former appeal and to exonerate bond sureties on such bonds. The principal ground for appellant's motion was that there was no valid judgment to supersede in the former appeal (R 86, 87, 89) and that the bonds as given were given for costs in the former appeal and to supersede the effect of the invalid judgment. As found by this Court in its opinion filed December 13, 1955, cited above, the judgment in the former appeal was fatally defective in that it did not comply with Rule 54(b) of the *Federal Rules of Civil Procedure,* Title 28 U.S.C.A. for the reason that it failed to dispose of all claims before the trial Court, and in particular, a cross-claim between the co-defendants; and further, that it did not contain an express determination that there was no just reason for delay in the entry of final judgment on the verdicts and also failed to contain an express order that such judgment should be entered. The purported judgment as such was entered by the Clerk without any direction, and appellants

submit that such entry was without force and effect in that Rule 54(b) requires that: ". . . The Court may direct the entry of a final judgment upon one or more and less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. . . ."

Rule 58 of the *Federal Rules of Civil Procedure,* 28 U.S.C.A., entitled "Entry of Judgment," states:

> "Unless the court otherwise directs *and subject to the provisions of Rule 54(b),* judgment upon the verdict of the jury shall be entered forthwith by the clerk." (Emphasis supplied.)

Accordingly, it is clear that the Clerk had no authority to enter the judgment as was done in that such entry must be made subject to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure and, accordingly, it must follow that the entry therefor was null and void and of no force and effect.

Further, this Honorable Court in its opinion and mandate, dismissed the appeal, former docket numbers 14529, 14530 and 14531, for the failure of the trial Court to comply with Rule 54(b), and stated in its opinion filed December 13, 1955, that:

> ". . . The verdicts now stand with no judgment. . . ."

Also, this Honorable Court stated that a single new appeal could be made. Appellants submit that the dismissal of the appeal on jurisdictional grounds, in that 28 U.S.C. 1291 gives this Court jurisdiction only

to hear on appeal from the District Court for the District of Alaska on final judgments, terminated that appeal and voided the purported judgment therein appealed from. Accordingly, any bonds, be they cost or supersedeas, filed by the appellants in the former appeal are also void and of no further force and effect. A similar set of circumstances presented itself to the Supreme Court, Appellate Term, of the State of New York, in the case of *Gelder v. Maryland Surety Co.* (1912, Supreme Court Appellate Term, 137 N.Y.S. 716, wherein the Court had the following to say:

> "This case grew out of an appeal on order granting a judgment on a supersedeas bond. The bond was posted to stay of execution on a judgment acquired by the plaintiff. It was appealed and his motion was granted on appeal. The terms of the bond are as follows: 'If the appeal is dismissed the appellant will pay the sum recovered or directed to be paid by the judgment.' The Court on appeal had the following to say: 'Here the action of the Appellate Court in setting aside the verdict and ordering a new trial necessarily extinguished the judgment. It may be the record of the judgment still remained as record uncancelled, but the judgment itself was without any vitality. The effect of the order of the Appellate Division ordering a new trial was very clearly stated in the opinion of the Court wherein it is said: 'By the order of this Court setting aside the verdict herein and ordering a new trial, the foundation of the judgment was taken away. The issues read by the pleadings are now undisposed of and until such issues are tried and determined,

there can be no judgment in the action.' 135 N.Y.S. 406.

The evident purpose and intent of the undertaking was that if the defendant (the principal) was required to pay the judgment, or if principal had exhausted all legal efforts to overthrow the judgment, that the defendant as surety would then pay the amount specified in the undertaking. If the defendant's principal was not liable on the judgment, it necessarily follows that the defendant should not be held liable upon its obligation of suretyship. The intent of the parties to the contract of suretyship was that the defendant should not be liable unless the liability of its principal was established. The action of the Appellate Division in setting aside the verdict and ordering a new trial destroyed the foundation upon which the judgment rested, and left the question of liability of the principal of this defendant (surety) still open for determination. To construe the contract of suretyship to mean that the surety is liable without regard to the liability of its principal is to give it a meaning contrary to its obvious purpose, and to foster upon this defendant a liability which the parties to this contract never contemplated that it should incur. Such a construction is not only highly unreasonable, but extremely unjust. When viewed in the light of these general principals, this case seems so clear that appeal to authority is hardly necessary."

Again, in the case of *Resslander v. Fidelity & Deposit Company of Maryland,* 161 N.Y.S. 417, in which case the Code of Civil Procedure, Section 1345, re-

lating to appeals to the Supreme Court from inferior Courts, declared that a judgment or order of the Appellate Division rendered upon an appeal authorized must be entered in the office of the Clerk of the Appellate Division. A judgment of the County Court was by the Appellate Division modified and affirmed, an order being entered in the office of the Clerk accordingly, whereupon an order was entered in the County Court. A bond for appeal to the Court of Appeals was conditioned that if the judgment appealed from was affirmed, or the appeal dismissed, the appellant would pay the sum recovered or directed to be paid by the judgment. The appeal was dismissed on the ground that the appeal was taken from an order of the Appellate Division and not a judgment. The Court held in that case that no recovery could be had on the bond, for the act was not complied with and there was no judgment from which an appeal would lie or which appellant need satisfy in accordance with the judgment. Thus, in the case at bar, there being no valid judgment, there can be no liability on the cost and supersedeas bonds.

In the case of *Regiera v. U.S.F. & G. Co.,* 136 N.Y.S. 42, Supreme Court Appellate Term, a judgment was taken by default and an appeal was subsequently taken and undertaking was given containing a statement that if the judgment was affirmed, or the appeal dismissed, the defendant would pay the same. The appeal was dismissed and the defendant moved in the trial Court to set aside the default. This was denied by the trial Court but on appeal, the default

judgment was vacated. In this case, the question before the Court was an action on the undertaking. The Court denied any relief under the bond to the plaintiff, stating that:

> "The vacation of the judgment relieved the defendant from any liability under the undertaking and this action cannot be maintained."

Likewise, in the case of *Jones v. Costa* (Municipal Court of Appeals for the District of Columbia), 94 A. (2d) 651, where the defendant filed a supersedeas bond prior to filing his notice of appeal and subsequent thereto, the plaintiff moved to assess damages under the defendant's supersedeas bond, the defendant, having made no further attempt to prosecute his appeal, the Court had the following to say with regard to the supersedeas bond filed prior to the notice of appeal:

> "The authority for filing the supersedeas bond was Municipal Court Rule 60 (now Municipal Court Rule 71 patterned after Federal Rules of Civil Procedure, Rule 73, 28 USCA) which rule provides: 'Whenever an appellant desires a stay on appeal he may within ten days from the date of entry in the civil docket of the judgment or order appealed from, present to the court for its approval a supersedeas bond, which shall have such surety or sureties as the court requires.' It will be observed that the rule permits 'appellant' to file such bond. We think this is a clear indication that a supersedeas bond cannot be filed or at least cannot become effective, until the party filing it has also filed notice of appeal. This is made plain by the Federal Rules of Civil Pro-

cedure, Rule 62(d) which provides: 'When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.' ''

Further, at page 53 of the Court's opinion, the following appears:

> "It seems apparent that the rule of the trial court permits the giving of a supersedeas bond only by one who has taken the final jurisdictional step towards prosecuting an appeal by filing notice of appeal."

The Court also stated that:

> "In the absence of notice of appeal, it is our conclusion that the bond never became effective as a statutory obligation and no liability existed thereon."

Accordingly, the Federal Rules allow the filing of a supersedeas bond to obtain a stay only after the jurisdictional requirements have been satisfied, to-wit; filing a notice of appeal. In the case at bar this Court has held it had no jurisdiction to entertain the appeal in that the purported judgment appealed from was not final and in conformance with Rule 54(b) and, accordingly, it had no jurisdiction under Section 1291, Title 28 U.S.C.A. to entertain the appeal. Appellants submit that the failure of this jurisdictional require-

ment nullifies each and every act after the signing of the purported judgment in that such act to-wit; the signing of a valid judgment, is necessary to validate any and all events subsequent thereto. Accordingly, the appellants not only had no right to supersede the invalid judgment, but did not obtain a stay by virtue of posting the supersedeas bond in that the judgment itself was defective and not entitled to execution.

In the case of *R. D. Goldberg Theatre Corp. v. Tri-State Theatre Corp.* (8th Cir.), 119 Fed. Supp. 521, where there was an attempted appeal from a motion for inspection of documents and a supersedeas bond was applied for, the Court had the following to say:

> "But, both upon principle and by acknowledged authority, the right to supersede presumes the right to appeal as distinguished from the possession of a meritorious appeal. But where no right to appeal exists there is no right to supersede."

Accordingly, in the case at bar, due to the fact that there was no valid judgment, no right to supersede existed and, therefore, the bonds filed can have no force and effect and should have been discharged and the sureties thereon exonerated.

Likewise, in the case of *Hampshire Arms Hotel Co. v. St. Paul Mercury & Indemnity Co.,* 9 N.W. (2d) 413, where the plaintiff had recovered a judgment and the defendant noticed appeal, and subsequent thereto the defendant entered judgment, the plaintiff moved to dismiss the appeal as premature on the ground that

no judgment had been entered prior to the noticing of the appeal. The defendant then moved for an order nunc pro tunc changing the date of entry of the judgment, and the trial Court entered an order nunc pro tunc changing the date of judgment. The Appellate Court granted plaintiff's motion to dismiss and held the order nunc pro tunc void. The Appellate Court had the following to say concerning the bond posted by the defendant subsequent to his noticing appeal which occurred prior to his entry of judgment, as follows at page 415:

> "The dismissal of the appeal was in effect an adjudication that the appeal, and consequently the bond, was void. The adjudication operates to estop plaintiff from asserting that the bond was valid or that the attempted appeal was consideration for it."

Likewise, in the case of *Janes v. Kuhn,* 161 S.W. (2d) 778, where two plaintiffs brought an action against four defendants and a jury trial was had resulting in a judgment in favor of three of the defendants with no disposition by verdict or otherwise as to the fourth defendant, and the appeal was sought to be perfected by the plaintiffs to the Court of Civil Appeals, an appeal bond was filed on January 10, 1940, and the appeal was dismissed on March 20, 1941, by the Court of Civil Appeals for the failure of the judgment to dispose of the claim against the fourth defendant. There was no appeal from the ruling of the Court of Civil Appeals of March 20, 1941, dismissing the appeal, and the plaintiffs sought to obtain

judgment in accordance with the verdicts returned and dismissed as to the fourth defendant. Plaintiffs further sought an order nunc pro tunc which order recited that the judgment was entered nunc pro tunc for the purpose of correcting the record this 29th day of March, 1941. No appeal was had after the entry of the second judgment and the new judgment was presented to the Court of Civil Appeals by motion and supplemental transcript to correct the record. The Court of Civil Appeals reinstated the appeal and reversed the judgment and granted a new trial. The Commission of Appeals of Texas granted the writ of error and in its opinion stated as follows:

> "It is well settled in this state that when a judgment is pronounced at one term and not entered of record at that term but is entered nunc pro tunc at the succeeding term, the right of appeal from such nunc pro tunc order dates from the entry thereof (citing cases). It is also well settled that an appeal bond filed at a previous term of court, and prior to the entry of a nunc pro tunc order at a subsequent term of court, is premature and ineffective to perfect an appeal from such nunc pro tunc order" (citing cases).

Accordingly, the judgment of the Court of Civil Appeals was reversed and the appeal was dismissed.

Also, in the case of *Pick et al. v. Pick et al.* (Wis.), 15 N.W. (2d) 807, where there was a deposit made to stay execution and for costs, the Court had the following to say with regard to a dismissed appeal:

> "When an appeal is dismissed the appeal bond or undertaking or deposit of money in lieu thereof

falls with it. On a second appeal a new undertaking or deposit must be given to perfect it (citing cases). When the first appeal was dismissed on December 7, 1943, and the record returned to the trial court, appellants were in the same position as though no appeal had been taken, so far as perfecting a second appeal."

While appellants will concede that it is not a jurisdictional requirement that the appellants file a supersedeas bond in an appeal to the Court of Appeals, it is their contention that if one is filed on a stay of execution and the appeal is subsequently dismissed for the reason that the so-called judgment appealed from was defective, then the bond staying the execution of that judgment is relieved of any force and effect and should be discharged and the sureties exonerated. Thus, in the case at bar where the cost bonds and the supersede as bonds were posted pursuant to rule and to obtain a stay of the so-called judgment, though defective, and that appeal was subsequently dismissed and the matter was remanded to the trial Court for the entry of valid judgment in conformance with the rules, appellants contend that the matters accomplished in the first and former appeal had no further force and effect after this Court dismissed the appeal, and that it is as if no appeal had been taken. In order to obtain a stay the appellants are required to comply with the *Federal Rules of Civil Procedure* which provide that the appellant may obtain a stay of execution on appeal by posting a proper supersedeas bond. The language of the

cost and supersedeas bonds filed in the former appeal clearly indicates that the bonds were intended to supersede and stay the execution of the so-called judgment then of record. It is certain that the principal and sureties on such bonds did not contemplate a second and successive appeal, as the only judgment then in existence was the so-called judgment declared to be of no further force and effect and void by this Court, and did not contemplate the judgment subsequently signed herein on the 26th day of May, 1956. As hereinbefore set forth, Rule 58 of the *Federal Rules of Civil Procedure* concerning entry of judgment requires that entry be subject to the provisions of Rule 54(b) with reference to the express direction of the Court for entry. Rule 62 of the *Federal Rules of Civil Procedure* concerning stay of proceedings to enforce a judgment, in sub-paragraph (a) therein, provides that:

> "Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten days after its entry."

Sub-paragraph (d) of the same rule provides:

> "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule."

Rule 69 of the *Federal Rules of Civil Procedure* concerning execution and sub-paragraph (a) therein provides that:

> "Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise."

Accordingly, in order that the plaintiffs herein might have had a writ of execution issue, the necessity of a valid judgment was requisite under the rules. It is apparent that no such judgment existed prior to the one signed on the 26th day of May, 1956, and, accordingly, execution could not lawfully have issued on the former defective judgment, nor can the fact that the former so-called judgment was in fact entered, impart any validity to it in that it was entered contrary to the *Federal Rules of Civil Procedure* and in disregard of the requirement that entry be made subject to Rule 54(b).

Therefore, the appellants submit that their motion to discharge bond and exonerate bond sureties should have been granted for the reason that there was not in existence a valid and existing judgment upon which a stay could be predicated and a supersedeas bond filed. When the fact was established that the so-called judgment was void and that the verdicts stood with no judgment, the bonds were then relieved of any further force and effect and should have been discharged and the sureties exonerated. The appellees' motion for judgment on the bonds was denied and no cross-appeal has been taken therefrom. Apparently the appellees recognize the fact that the bonds are of no further force and abide by the decision of the trial Court.

B. DENIAL OF APPELLANT MATANUSKA VALLEY LINES, INC.'S MOTION TO SET BOND ON APPEAL; CONTINUATION OF COST AND SUPERSEDEAS BONDS BY TRIAL COURT.

Appellants contend by the refusal of the trial Court to discharge bonds and exonerate sureties, to set and establish a supersedeas bond on appeal and by subsequent statements of the Court appearing in the record (R 80, 82), the trial Court in effect has held that the bonds, both cost and supersedeas, filed in the old appeal which was dismissed, are continuing and are in full force and effect in this new appeal to supersede the judgment signed on May 26, 1956, being appealed herein.

Concerning particularly the supersedeas bonds posted in the former appeal, it is apparent that the sureties on some bonds are corporate sureties and compensated sureties (R 27, 48, 62), and on another are individual, non-compensated sureties (R former docket number 14529, p. 27). It is fundamental that the rule concerning a discharge of the surety is different and less stringent with respect to a non-compensated surety than in the case of a compensated surety. It is said that with regard to the former, the rule of *strictissimi juris* applies and the undertaking will be construed as most favorable to the non-compensated surety. With regard to the construction of the undertaking of a compensated surety, the rule of *strictissimi juris* is not applied and the construction given will be liberal and in favor of sustaining the bond and against the discharge of the surety. This, of course, is a rule of construction only, and to be applied only when ambiguity arises. However, appellants contend that

even though the undertaking of a compensated surety is given a more liberal construction, in the case at bar the undertaking of the compensated surety cannot be construed to concern itself with anything other than the purported judgment which was subsequently declared to be void and of no force and effect. Accordingly, the *American Law Institute Restatement of Security,* at Section 128, concerning modification of principal's duty, states as follows:

> "Where, without the surety's consent, the principal and the creditor modify their contract otherwise than by extension of time of payment (sub-paragraph a), the surety, other than a compensated surety, is discharged unless the modification is of a sort that can only be beneficial to the surety, and (sub-paragraph b) the compensated surety is (sub-paragraph i) discharged if the modification materially increases his risk and (sub-paragraph ii) not discharged if the risk is not materially increased, but his obligation is reduced to the extent of loss due to the modification."

The Court in the case of *Crane v. Buckley,* 203 U.S. 441, states that:

> "The controlling principle which, in the absence of other considerations, determines the liability of one who executes an appeal bond is, as in the case of other contracts of suretyship, that he is entitled to stand on the express terms of his contract."

Also it was stated in the case of *Cooper-Mankin Fuel Co. v. Chesapeake & O. R. Company,* 30 Fed. (2d) 500 at 502:

> "It is of course true that, while the rule of strictissimi juris does not apply to sureties for compensation, these being governed rather by a rule of liberal construction as to liability, . . . nevertheless they are entitled to have their contracts interpreted in full accordance with ordinary legal principles, and their liability is not to be enlarged beyond the scope of the terms of their contract."

Again in the case of *New Amsterdam Casualty Co. v. Central National Fire Insurance Co.* (8th Cir.), 4 Fed. (2d) 203 at 207, the Court stated:

> "It is only when a provision of a bond by a surety or insurance company is ambiguous and subject to two different constructions that it will be construed against the surety company."

Again in the case of *Pacific County v. Illinois Surety Company,* 234 Fed. 97 at page 98, the Court stated:

> "The rule of strictissimi juris does not apply to sureties for compensation. This rule was only invoked for the protection of individuals acting gratuitously. Liberal construction of liability against sureties for value is the rule. (citing cases) A surety company for a consideration is, however, entitled to have its contracts interpreted by the ordinary rules of law. (citing cases) And the liability cannot be enlarged beyond the scope of the terms of the contract, and where the language is unambiguous the question of construction does not enter."

Accordingly, it is submitted that the supersedeas bonds filed in the former appeal could have only been for

the sole purpose of staying the execution of the so-called judgment subsequently declared void. As will appear from the record (R 103) the condition of the principal has changed materially since the filing of the supersedeas bonds. It now appears that the principal is in the hands of a receiver and accordingly, the likelihood of the principal concerning its ability to pay the judgment, if affirmed, is substantially lessened if not altogether removed. Thus, the sureties in executing the supersedeas bond for the stay of the so-called judgment subsequently declared void, did so under the impression that the principal may well be able to satisfy the judgment, if affirmed, out of its assets. However, due to the subsequent change of events, the sureties are now placed in the position of nearly absolute liability in the event that the judgment is affirmed. Thus, it appears that the picture concerning liability has changed materially with regard to the supersedeas bonds and that the continuance of them has constituted a material increase of risk on behalf of both compensated and non-compensated sureties. Therefore, this material increase in risk must result in a discharge of the bonds and an exoneration of the bond sureties, and accordingly the trial Court erred in its ruling in denying appellant's motion to set bond on appeal and in effect, continuing the bonds for the reason that the risk has materially increased subsequent to the execution of the bonds by the various sureties, and as a result, works a discharge of such bonds and an exoneration of such sureties. The sureties executed the supersedeas bonds contemplating one set of circumstances, and subsequent to the dismissal

of the appeal invalidating the so-called judgment, are now faced with almost absolute liability on their bond if the same is to be continued and the only judgment on appeal is affirmed.

C. THE TRIAL COURT ERRED IN DENYING APPELLANT MATANUSKA VALLEY LINES, INC.'S MOTION FOR NEW TRIAL.

This question has been argued in appellant's opening brief, and accordingly, appellants adopt such argument as their argument with regard to this specification of error. Such argument appears in appellant's brief (Br. 7-16).

V.

CONCLUSION.

Appellants respectfully submit that the trial Court erred in failing to grant their motion to discharge bond and exonerate sureties for the reason that no valid judgment existed which could be superseded and accordingly, the bonds given to supersede any such judgment are null and void according to the authorities cited by the appellants herein. Further, that the trial Court erred in denying appellants' motion for bond on appeal and in effect, extending the coverage of the supersedeas bonds to the new appeal in that such extension results in the material alteration and the material increase of the risk undertaken by the

sureties to such supersedeas bond, and accordingly, works a discharge of such parties.

Dated, February 28, 1957.

Respectfully submitted,

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